

IN THE SUPREME COURT OF MISSOURI

APRIL RIDDER and	)	
ERNEST RIDDER,	)	
Appellants,	)	Supreme Court No. SC84693
	)	
vs.	)	Southern District No. SD24542
	)	Greene County Case No. 100CC2565
RUDOLPH HIBSCH,	)	
	)	
Respondent.	)	

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**RESPONDENT’S BRIEF**

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Respectfully submitted,

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## **JURISDICTIONAL STATEMENT**

Rudolph Hibschi adopts and incorporates herein by reference the Jurisdictional Statement set forth in Appellants' Brief.

## STATEMENT OF FACTS

There is a very limited issue raised by appellants in their Point Relied On. The only matter on appeal is the trial court's sustaining of defendant Rudolph Hibsich's (hereinafter "Hibsich") Motion for Summary Judgment on statute of limitations grounds.

April Ridder was born on June 29, 1972. (LF 31) Ridder claims acts of sexual contact with Hibsich occurred between the ages of 9 and 12. (LF 4) This would make the alleged acts to have occurred from approximately 1981 to 1984. (LF 19) In 1993, April Ridder (approximately 21 years of age) and her mother Altheda Livesay made accusations against Hibsich regarding alleged sexual contact. (LF 19, 43 to 44, 50 to 54, 62)

On June 26, 2000, appellants filed their petition in the Circuit Court of Greene County alleging the following counts: Count I (battery); Count II (intentional infliction of emotional distress); Count III (negligent infliction of emotional distress); Count IV (childhood sexual abuse); and Count V (loss of consortium). (LF 3 to 11)

Hibsich filed a Motion for Summary Judgment with Exhibits and Suggestions in Support of Motion for Summary Judgment on March 19, 2001 (hereinafter "Motion"). (LF 18 to 60). The Motion stated that Count I (battery) was barred by section 516.140 (2 years from the age of majority) and section 516.120 (5 years from the age of majority).<sup>1</sup> (LF 57 to 58) Counts II and III are dependent upon the alleged conduct for battery and therefore are also barred by section 516.140. (LF 58) Count IV (childhood sexual abuse)

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<sup>1</sup> All citations are to RSMo. 2000 unless otherwise stated.

specifically pleads section 537.046. (LF 7 to 8) The Motion stated that this count is barred by the very statute cited by appellants which provides five (5) years from the age of eighteen (18) or three (3) years from the date of discovery, whichever period is longer. (LF 59) The five (5) year period expired in 1995 and the three (3) year period expired by at least 1996. (LF 59) The Motion stated that Count IV (Loss of Consortium) is barred since it is derivative of the other counts that are barred. (LF 59)

On April 11, 2001, appellants filed their Suggestions in Opposition (hereinafter “Opposition Brief”) to the Motion. (LF 61 to 80) The Opposition Brief admitted that the statutes of limitations cited in the Motion were valid, but claimed that section 516.371 permitted the case to continue. (LF 61 to 80)

On April 25, 2001, Hibsich filed Defendant’s Reply to Plaintiffs’ Suggestions in Opposition to Motion for Summary Judgment of Defendant Rudolph Hibsich (hereinafter “Reply Brief”). (LF 81 to 83) The Reply Brief stated that the ten (10) year statute of limitations period of section 516.371 begins running at the time of the alleged abuse. (LF 81 to 83) Therefore, this statute of limitation would have expired in 1994 at the very latest. (LF 83)

On June 21, 2001, oral argument was conducted before the Honorable J. Miles Sweeney in the Circuit Court of Greene County, Missouri. (LF 91) On October 4, 2001, summary judgment was granted in favor of Hibsich on all counts. (LF 91) On October 19, 2001, the Judgment was executed by the Court and was formally filed on October 23, 2001. (SLF 1)

**POINT RELIED ON**

**THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RUDOLPH HIBSCH, BECAUSE APPELLANTS FAILED TO BRING THEIR CAUSES OF ACTION WITHIN THE APPLICABLE STATUTES OF LIMITATIONS, IN THAT THE LONGEST STATUTE OF LIMITATION FOR THE ALLEGED SEXUAL ABUSE (SECTION 516.120) EXPIRED ON JUNE 29, 1998 WHEN PLAINTIFF WAS TWENTY-SIX (26) YEARS OLD AND APPELLANTS DID NOT FILE SUIT UNTIL JUNE 26, 2000.**

*K.G. v. R.T.R.*, 918 S.W.2d 795 (Mo.banc 1996)

*Frazee v. Partney*, 314 S.W.2d 915, 919 (Mo. 1958)

*Vandenheubel v. Sowell*, 886 S.W.2d 100 (Mo.App.W.D. 1994)

*H. R. B. v. Rigali*, 18 S.W.3d 440, 45-46 (Mo. App. E.D. 2000)

Rule 74.04, Missouri Rules of Civil Procedure

Section 516.140 RSMo. 2000

Section 516.120 RSMo. 2000

Section 537.046 RSMo. 2000

Section 516.371 RSMo. 2000

Section 516.170 RSMo. 2000

Section 516.100 RSMo. 2000

## **ARGUMENT**

### **Standard of Review**

When considering appeals from summary judgment, a court should review the record in the light most favorable to the party against whom the judgment was entered. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). “Facts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” *Id.*; Rule 74.04. The Court on review should apply the same criteria for testing the propriety of summary judgment as employed by the trial court in judging the motion initially. *Id.*

### **Point I**

**THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RUDOLPH HIBSCH, BECAUSE APPELLANTS FAILED TO BRING THEIR CAUSES OF ACTION WITHIN THE APPLICABLE STATUTES OF LIMITATIONS, IN THAT THE LONGEST STATUTE OF LIMITATION FOR THE ALLEGED SEXUAL ABUSE (SECTION 516.120) EXPIRED ON JUNE 29, 1998 WHEN PLAINTIFF WAS TWENTY-SIX (26) YEARS OLD AND APPELLANTS DID NOT FILE SUIT UNTIL JUNE 26, 2000.**

Appellants’ alleged causes of action for child sex abuse are governed by four statutes of limitations. The four statutes were presented in the Motion and Reply Brief to the trial court. The trial court properly applied the statutes of limitations and granted summary judgment on all counts of appellants’ petition. The importance of applying the



appropriate statute of limitations was discussed in *Vandenheubel v. Sowell*, 886 S.W.2d 100, 103 (Mo.App.W.D. 1994). The *Vandenheubel* Court held as follows:

Courts and commentators which have discussed this issue recognize that allowing a plaintiff to bring an action based solely on the recollection of very old incidents that were allegedly repressed from consciousness, with no means of independently verifying the memory repression, would effectively eliminate the statute of limitations. This would give a plaintiff unlimited time to bring an action, while the facts tend to become increasingly difficult to determine as the age of the alleged incident increases. *Id.*

**A. Counts I (Battery), II (Intentional Infliction of Emotional Distress) and III (Negligent Infliction of Emotional Distress) are barred by the two-year limitation from the age of majority for assault and battery in section 516.140 and by the five-year limitation from the age of majority for general torts in section 516.120.**

Section 516.140 provides that the statute of limitations for battery is two (2) years from the age of majority. Section 516.120 provides a five (5) year limitation from the age of majority for general torts. According to section 516.170 the age of majority for sections 516.140 and 516.120 is twenty-one (21). The claims for intentional infliction of emotional distress and negligent infliction of emotional distress as pled are dependent upon the same conduct alleged in the claim for battery. Therefore, the claims for

intentional infliction of emotional distress and negligent infliction of emotional distress are part of the action for battery and are subject to the two (2) year limitation for battery. *K.G. v. R.T.R.*, 918 S.W.2d 795, 798 (Mo.banc 1996).

Absent tolling of the limitation period, a plaintiff has until age twenty-three (23) to file suit for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. A plaintiff has until the age of twenty-six (26) to file suit for a general tort. In this case, the plaintiff was just days short of her twenty-eighth (28) birthday when the petition for damages was filed on June 26, 2000.

The limitation periods of sections 516.140 and 516.120 may be extended if the cause of action has not yet accrued at age twenty-three (23) or age twenty-six (26) respectively. The cause of action is deemed to accrue when the resulting damage is sustained and is capable of ascertainment. *K.G.*, 918 S.W.2d at 798. In this case, the alleged damages were capable of ascertainment by 1984 at the very latest. Because appellant was a minor in 1984, the aforementioned statutes of limitations were tolled for the purposes of section 516.140 and 516.120 until appellant reached the age of twenty-three (23) or twenty-six (26). Appellant did not file this case until she was almost twenty-eight (28) years of age.

Plaintiff fails to plead repressed memory to attempt to toll the statutes of limitation. Assuming *arguendo* that plaintiff intended to plead repressed memory, the cause of action still fails because appellant first made accusations against Hibsich in 1993. In 1993, appellant would have been twenty-one (21) years of age. The applicable statutes

of limitations would have begun to run, and appellant's causes of action would have been barred when she reached age twenty-three (23) or twenty-six (26) respectively.

**B. Appellants' case is barred by the five-year and three-year child sex abuse limitations period in section 537.046.**

Count IV of plaintiffs' petition specifically pleads childhood sexual abuse in violation of section 537.046, which is specific to child sexual abuse. This statute gives plaintiffs five (5) years from the age of eighteen (18) in which to file suit. Another part of the statute gives a plaintiff three (3) years from the date the plaintiff discovers or reasonably should have discovered the causal connection between the injury and the abusive acts. As between the two limitation periods, plaintiff has whichever period is longer.

Appellant's claim for childhood sexual abuse is time barred under both prongs of section 537.046. The five (5) year statute of limitation expired in 1995 when plaintiff was twenty-three (23). If appellant had claimed repressed memory, then the statute of limitation ran out in 1996 when she was age twenty-four (24). This is three (3) years from the date appellant first made allegations of sexual contact.

**C. Appellants case is barred by the ten-year limitation period from the act of incest in section 516.371.**

Section 516.371, states as follows:

*Notwithstanding any provision of law to the contrary, there shall be a ten year statute of limitation on any action for damages for personal injury caused to an individual by a person within the third degree of affinity or*

*consanguinity who subjects such individual to sexual contract, as defined in Section 566.010 RSMo.*

Section 516.371, which became effective on August 28, 1989, gives a plaintiff who alleges incestuous abuse by someone within the third degree of affinity ten years in which to file suit. In interpreting this statute, the Missouri Supreme Court in the case of *K.G. v. R.T.R.*, 918 S.W.2d 795 (Mo. banc 1996), held as follows:

*The provision relating to tolling for persons under twenty-one years of age of § 516.170 is not applicable to § 516.371, and the provision of § 516.100, relating to accrual of causes of action when damages are ascertainable, is also not applicable to the statute of limitation for incest found in § 516.371. Nothing in § 516.371 suggests that the running of the statutory period is triggered by accrual of damage or injury. **Thus, that statute begins running at the time of the act of incest unless otherwise***

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*Id.*            emphasis added)

limitations contained within section 516.371 begins running at the time of the alleged section 516.371 be tolled until the person reaches the age of 18, the legislature would 516.100, or would have added a tolling provision to the statute.

In *K.G.*, the Missouri Supreme Court commented in dicta that the plaintiff would not be able to bring a cause of action even if the statute was tolled until the age of 18. *Id.* at 798. This was a case-specific response to the allegations raised in that case to address flawed arguments by counsel that it should be ten (10) years from the eighteenth birthday. If the Court found that even if it determined the legislative intent of section 516.371 was ten years from the eighteenth birthday (which it did not), the claim would still be barred by the statute of limitations.

Missouri courts have consistently held that special statutes of limitations, not within the application of sections 516.570 and 516.100, cannot be tolled by exceptions that are not found in the statute itself. *See Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 486 F. Supp. 56, 59 (E.D. Mo. 1980) (quoting multiple Missouri cases on this point). In *Frazee v. Partney*, 314 S.W.2d 915, 919 (Mo. 1958), this Court stated: “A special statute of limitations must carry its own exceptions and we may not engraft others upon it.” *Id.*

Statutes of limitations are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. Such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship. Such exceptions are matters of public policy for determination by the General Assembly. *Hunter v. Hunter*, 237 S.W.2d 100, 104 (Mo. 1951) (citations omitted). In discussing the application of Missouri law pertaining to exceptions to statutes of limitations, this Court

in *rel. Bier v. Bigger*, 178 S.W.2d 347 (Mo. 1944), noted that the effects may  
*Id.* at 351. *Id.*

Section 516.371 contains no exceptions to the ten year limitations period.

the effects are not harsh. Appellants first made allegations of sexual abuse in 1993, and this is not a case involving repressed memories. Appellants' five year statute of allegations. She had at least five years after she reached the age of majority to prosecute her claims, under various theories. The harsh result under these circumstances would be especially when the only other adult present in the household at the time of the alleged abuse, Respondent's wife, is now deceased. (LF 42)

Therefore, the ten year statute of limitations found in section 516.371 would have run, at the very latest, in 1994.

**Appellants, cause for loss of consortium cannot survive after all other claims  
have been barred by the applicable statutes of limitations**

Court is aware, a loss of consortium claim is a derivative claim that cannot survive when Mrs.  
no valid claim for her alleged injuries. *H. R. B. v.*, 18 S.W.3d 440, 45-46 (Mo.  
App. E.D. 2000) (husband's claims for child sexual abuse were barred by statutes of

## **CONCLUSION**

Appellants have failed to identify any errors by the trial court. Hibsich was entitled to judgment as a matter of law because the uncontroverted facts show that Count I (battery), Count II (intentional infliction of emotional distress), Count III (negligent infliction of emotional distress), Count IV (childhood sexual abuse) and Count V (loss of consortium) are all barred by the applicable statutes of limitations. There is no authority for tolling the statute of limitation found in section 516.371 until a plaintiff reaches the age of eighteen (18), and exceptions to a statute of limitations, such as tolling during the age of minority, are matters of public policy for the determination of the legislature. The decision of the trial court in granting the summary judgment should be affirmed in all respects.

Respectfully submitted,

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COMES NOW Michael K. Cully, of LOWTHER JOHNSON Attorneys at Law,  
LLC, of lawful age and having been duly sworn, states that this Brief complies with the

I further state that the number of words contained in this Brief are 2,834, and that

I further state that a floppy disk containing the Brief is being filed herewith, and  
said disk is double-sided, high density, IBM-PC compatible, 1.44 MB 3 ½ inch size and

STATE OF MISSOURI    }

COUNTY OF GREENE    }

states that he is the attorney above named, and the facts and matters as stated above are  
true according to this best information, knowledge, and belief.

Michael K. Cully

Subscribed to before me on this \_\_\_\_ day of October, 2002.

Linda Matney, Notary Public



## **CERTIFICATE OF SERVICE**

COMES NOW Michael K. Cully, of LOWTHER JOHNSON Attorneys at Law, LLC, and certifies that Respondent's Brief in the within cause was hand-delivered to the following named person at the addresses shown, on the 21<sup>st</sup> day of October, 2002;

2 Copies:     W. Tom Norrid  
                    William H. McDonald & Associates  
                    300 S. Jefferson, Suite 600  
                    Springfield, MO 65806

and was forwarded by Federal Express to the following named person at the address shown, on the 21<sup>st</sup> day of October, 2002:

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                    Supreme Court of Missouri  
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